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November 7, 2011

VIA ELECTRONIC MAIL SERVICE
The Honorable Jocelyn G. Boyd
Clerk
South Carolina Public Service Commission
Post Office Drawer 11649
Columbia, South Carolina 29211

RE: Complaint and Petition for Relief of BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T South Carolina v. Affordable Phone Services, Inc. d/b/a High Tech Communications, Dialtone & More, Inc., Tennessee Telephone Service, LLC d/b/a Freedom Communications USA, LLC, OneTone Telecom, Inc., dPi Teleconnect, LLC and Image Access, Inc., d/b/a New Phone
Docket No. 2010-14-C, Docket No. 2010-15-C, Docket No. 2010-16-C, Docket No. 2010-17-C, Docket No. 2010-18-C, & Docket No. 2010-19-C

Dear Jocelyn:

BellSouth Telecommunications, LLC ("AT&T") filed a recent order from the North Carolina Utilities Commission with a letter claiming that the order will inform issues to be determined by this Commission. That order should not guide the Commission's determinations here, for several reasons. Moreover, if the Commission is to consider decisions from other commissions, it will want to consider any states that have not adopted AT&T's position. For example, the Louisiana Public Service Commission ("LPSC") recently rejected a proposed decision adopting AT&T's positions, and remanded the case to the administrative law judge.

Nevertheless, should this Commission look for guidance from other state commissions on the issues pending in the above-referenced docket, the North Carolina order should not be followed. For the reasons explained herein, the North Carolina order is irretrievably flawed by its violation of federal law and the parties' respective agreements, and should be overturned on appeal. Furthermore, the North Carolina order bases its decision not the undisputed ***actual*** facts, but on ***hypothetical*** facts which make the North Carolina order unsustainable as precedent and subject to reversal on appeal.

The FCC made clear that when calculating wholesale rates, the wholesale rate would be set "***below*** retail rate levels."[1] The North Carolina Utilities Commission's order strays from federal law because it does not require AT&T to sell its services subject to promotions at a wholesale rate ***below*** the retail rate.[2] The North Carolina Utilities Commission's order also allows AT&T to use promotions to avoid its wholesale obligation in violation of paragraphs 948 and 950 of the Federal Communications Commission's ("FCC") *Local Competition Order*.

Furthermore, the North Carolina Utilities Commission's order disregards the parties' interconnection agreements ("ICAs"), which make clear that AT&T must make its promotions available to resellers on terms that are no less favorable than those received by AT&T's retail customers. In fact, the ICAs at issue before the North Carolina Utilities Commission (which also apply in South Carolina) show that AT&T must make promotions lasting 90 days or less available for resale at the promotional rate, but must make promotions lasting longer than 90 days available ***at the promotional rate further discounted by the avoided cost***. Thus, for the long term promotions at issue in this case, the resale rate must be ***below*** the promotional rate.

The North Carolina Commission attempted to justify its position by reasoning that over time, the cumulative amount paid by a reseller will drop below the cumulative amount paid by the retail customer. This contravenes the undisputed fact that the promotions are paid in a single lump sum, not over time, and that the customer need not maintain service for longer than 30 days to be entitled to the cash back promotion. It also contravenes paragraph 950 of the *Local Competition Order*, which holds that "***[t]o preclude the potential for abuse of promotional discounts***, any benefit of the promotion must be realized within the time period of the promotion...."

Despite the fact that federal law clearly expects that wholesale prices will be set ***below*** retail rates, and expects that this obligation will be honored even when promotions are in play, the North Carolina Utilities Commission's order adopts AT&T's approach which results in the wholesale rate being ***ABOVE*** the retail rate. The FCC spent considerable effort explaining the importance of competition by resale and laying out how wholesale rates should be calculated in it *Local Competition Order*. The FCC made clear that when using percentages to calculate wholesale rates, the wholesale rate would be set by a "percent ***below*** retail rate levels."[3] The FCC also repeatedly expressed its concern that promotions would be used by ILECs to avoid

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[1] *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, FCC 96-325, 11 FCC Rcd 15499, ¶ 910 (rel. Aug. 8, 1996) ("*Local Competition Order*") (emphasis added).

[2] *See, e.g,* 47 C.F.R. § 51.607. "The wholesale rate that an incumbent LEC may charge for a telecommunications service provided for resale to other telecommunications carriers shall equal the rate for the telecommunications service, *less avoided retail costs*, as described in section 51.609." [Emphasis added.]

[3] *Local Competition Order* para. 910, (emphasis added).

their resale obligations – namely, the ILECs' obligation to wholesale their services at a rate "below retail rate levels." In fact, in the space of four paragraphs on promotions, the FCC articulates this concern *no less than **five** times*:

- "We are concerned that conditions that attach to promotions and discounts could be used to avoid the resale obligation to the detriment of competition"[4];
- "We are concerned that excluding promotions [from the wholesale obligation] may unreasonably hamper the efforts of new competitors that seek to enter local markets through resale."[5];
- "***To preclude the potential for abuse of promotional discounts***, any benefit of the promotion must be realized within the time period of the promotion. . . ."[6];
- "In addition, an incumbent LEC ***may not use promotional offerings to evade the wholesale obligation***, for example by consecutively offering a series of 90 day promotions."[7];
- Consequently, the FCC found that:

  > ...no basis exists for creating a general exemption from the wholesale requirement for all promotional or discount service offerings made by incumbent LECs. **A contrary result would permit incumbent LECs to avoid the statutory resale obligation by shifting their customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act.**[8]

The FCC's concern that ILECs would attempt to use promotions to avoid the wholesale obligation to resell services at a rate below "***below*** retail rate levels" has been borne out again and again. For example, for years AT&T sought to avoid extending gift card and cash back promotions altogether, but was made to do so against its will. *See e.g.*, *BellSouth Telecommunications, Inc. v. Sanford*, 494 F.3d 439, 442 (4th Cir. 2007); *In the Matter of dPi Teleconnect, LLC, v. BellSouth Telecommunications, Inc.*, North Carolina Utilities Commission Docket No. P-55, Sub 1744. As another example, in the second half of 2009, AT&T attempted to implement a scheme in which it proposed to credit resellers eligible for cash back promotions

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[4] *Id.* at para. 952.

[5] *Id.* at para. 950

[6] *Id.* at para. 950 (emphasis added)

[7] *Id.* (emphasis added).

[8] *Local Competition Order* ¶ 948.

not the fixed $50 cash back that the eligible retail customer received, but an amount drastically reduced by bizarre "retention" and "redemption" "factors." The net effect had AT&T providing its retail customers a cash back credit in the amount of $50, but extending resellers a promotion credit of only $5.54 in Texas; $3.73 in Georgia; $3.65 in Tennessee; $4.20 in Alabama; $5.92 in Kentucky; $3.74 in Louisiana; $4.66 in South Carolina, and so on across all the states. This Retail Promotion Methodology Adjustment model (as it was called by AT&T) was announced in various AT&T Accessible Letters and was to go into effect in September 2009, but was enjoined by the U.S. District Court for the Northern District of Texas. *See Budget Prepay, Inc. et al., v. AT&T Inc., f/k/a SBC Communications, Inc. et al., Cause No. No. 3:09-CV-1494-P in the U.S. District Court, Northern District of Texas, Dallas Division.* Although the Fifth Circuit eventually vacated the injunction, *See Budget Prepay, Inc. v. AT&T Corp.*, 605 F.3d 273, 281 (5th Cir. 2010), it did so solely as a matter of primary jurisdiction, and without review of the facts about AT&T's conduct the district judge had found so compelling.

Because AT&T's method for calculating the wholesale promotional price results in a wholesale price above, rather than below, the retail customer's price, it is less favorable to resellers. As a consequence, AT&T's method violates not just federal law, but also the parties' ICAs, and must be repaired or replaced.

The North Carolina Utilities Commission suggests that *BellSouth Telecommunications, Inc. v. Sanford*[9] approves AT&T's proposed method of reducing the value of the cash back promotion by the Commission's wholesale discount percentage. This is incorrect.

In fact, the principle that wholesale rates should always be ***below*** retail rates is key to the Fourth Circuit Court of Appeals' decision in *Sanford*, the leading appellate case on promotions. In *Sanford*, the Fourth Circuit held that promotional offers extending for more than 90 days created a "promotional retail rate" to which the avoided cost (wholesale discount) must be applied.[10] The Fourth Circuit held that for long-term promotional offerings (such as the ones at bar), the avoided cost or wholesale discount must be subtracted from the *effective* retail rate that results from applying the value of the promotional offering to the retail rate of the underlying service.[11]

The key lesson from *Sanford* is that wholesale must be less than retail. However, in cases like those at bar, where the promotion amount exceeds the retail price of the service (*e.g.*, a $25 service combined with a $50 cash back promotion), AT&T's methodology creates a higher price

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[9] *BellSouth Telecommunications, Inc. v. Sanford*, 494 F.3d 439 (4th Cir. 2007).

[10] This "promotional retail rate" is referred to herein as the "effective retail rate."

[11] *Sanford* at 442.

to resellers (through a smaller bill credit) than the price paid by AT&T's retail customers, which is ***exactly*** the outcome that *Sanford* found unreasonable.[12] In effect, the AT&T formula turns *Sanford* on its head by trying to use the court's reasoning to achieve the very result – a wholesale rate above retail – that offended the *Sanford* court and caused it to reject AT&T's policy of refusing to provide the value of cash back promotions to resellers altogether.

The North Carolina Utilities Commission erred by disregarding the facts. Notwithstanding the clear directive of the law and the ICAs, AT&T admittedly does not charge resellers a price ***below*** the retail promotional price; it charges resellers ***MORE*** than the retail promotional price. Therefore, AT&T's method for calculating cash back promotion credits approved by the North Carolina Utilities Commission conflicts with federal and state law and regulations because it violates the key principle that wholesale should be less than retail.

Sincerely,

s/ John J. Pringle, Jr.
John J. Pringle, Jr.

cc: C. Lessie Hammonds, Esquire (via electronic mail service)
Patrick W. Turner (via electronic mail service)
Henry Walker, Esquire (via electronic mail service)
John Heitmann, Esquire (via electronic mail service)
Christopher Malish (via electronic mail service)
Paul F. Guarisco, Esquire (via electronic mail service)

[12] As explained by the *Sanford* court, "Because its position would not account for the promotional rebate check, BellSouth's position would obviously impede competition. The competitive LEC would have to pay BellSouth a wholesale rate of $96 for the telephone service for which BellSouth's retail customers would pay only $20." *BellSouth Telecommunications, Inc. v. Sanford*, 494 F.3d 439, 451 (4th Cir. 2007). Although AT&T's method as applied in the case at bar results in a slight less stark example of the wholesale rate being higher than the retail rate, it violates the same core principal from *Sanford* that the wholesale rate *must be* less than the retail rate or competition would be harmed.

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2010-14 -19-C

IN RE:	)	
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Complaint and Petition for Relief of BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T South Carolina v. Affordable Phone Services, Inc. d/b/a High Tech Communications, Dialtone & More, Inc., Tennessee Telephone Service, LLC d/b/a Freedom Communications USA, LLC, OneTone Telecom, Inc., dPi Teleconnect, LLC and Image Access, Inc., d/b/a New Phone	)	**CERTIFICATE OF SERVICE**

This is to certify that I have caused to be served this day, one (1) copy of the November 7, 2011 Letter to The Honorable Jocelyn G. Boyd by placing a copy of same in the care and custody of the United States Postal Service (unless otherwise specified), with proper first-class postage affixed hereto and addressed as follows:

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s/ Carol Roof
Carol Roof
Paralegal

November 7, 2011
Columbia, South Carolina